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Masyitah bt Md Hassan v Sakinah bt Sulong

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HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCVC-162–08 OF 2018
EVROL MARIETTE PETERS JC
23 DECEMBER 2020

C

Evidence — Adverse inference — Failure to call material witness — Facebook postings by defendant were based on information given by third parties and documents prepared by third parties — Third parties were not called as witnesses — Whether third parties were material witnesses — Whether there was deliberate withholding of witnesses — Whether adverse inference ought to be invoked for non-calling of material witnesses

D

Evidence — Witness — Credibility of — Whether plaintiff's witnesses and defendant's witnesses were credible

E

Tort — Defamation — Defamatory statements — Plaintiff who was a doula sued defendant claiming damages for alleged defamatory statements posted by defendant on Facebook — Whether statements posted were defamatory — Whether statements posted by defendant had lowered the plaintiff in the estimation of right-thinking members of society — Whether plaintiffs entitled to general damages and exemplary damages

F

Tort — Defamation — Defences — Justification and fair comment — Whether plaintiff's police report was an admission of contents of defendant's Facebook postings — Whether defendant's defence could still stand pursuant to s 8 of the Defamation Act 1957 — Whether defence of justification proven — Whether defendant had in fact abstained from inquiring into facts, something which, if done, would have provided an accurate account of the event — Whether there was malice — Whether defence of fair comment proven — Defamation Act 1957 s 8

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H

The plaintiff in the present case was a *doula* or birth companion whereas the defendant was a doctor. The plaintiff had brought an action claiming for damages against the defendant for alleged defamatory statements that the latter had posted on her Facebook account. The said statements were made by the defendant on the 7, 8 and 12 February 2018 after a baby born via a home water birth to one Norizatul Amira Kamsan ('PW2'), had died on 4 February 2018. The Facebook postings were deleted sometime in August or September 2018,

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A after the present action was instituted on 10 August 2018. The facts that the statements were published by the defendant, and that they referred to the plaintiff were not disputed. The defendant's contention was that the contents of the postings were not defamatory, and even if they were, the defences of justification and fair comment had been established. The defendant submitted
B that: (a) the contents of the postings had conveyed merely that the plaintiff had been present at the birth of the baby, and that she had lied about that, and nothing more ('the first contention'); (b) the words used in the postings were 'melibatkan' and 'terlibat', which referred only to the plaintiff's involvement in the death of the baby, and not her direct participation ('the second
C contention'); and (c) instead of reading the postings holistically, the plaintiff had cherrypicked out of context specific words, to conclude that they were defamatory ('the third contention'). In respect of defence of justification, the defendant submitted that: (i) the contents of the plaintiff's police report were an admission by the plaintiff to the facts contained in the postings ('the fourth
D contention'); and (ii) based on s 8 of the Defamation Act 1957 ('the DA'), her defence should still stand even if the truth of every charge was not proved ('the fifth contention'). Regarding the defence of fair comment, the fundamental issue to be determined was whether the defendant had in fact abstained from inquiring into facts, something which, if done, would have provided an
E accurate account of the baby's death.

Held, allowing the plaintiff's claim with costs of RM30,000 subject to allocatur fees:

F (1) The court disagreed with the first contention as it was very clear that the postings were littered with remarks that were not only disparaging, but accusatory as well. Firstly, the hashtag #doulakeji was used, with 'keji' referring to vile. The word 'vile' was a parlance used interchangeably with 'evil', 'abominable', and 'vicious', which were sufficiently clear to the
G ordinary man. The ordinary man referred to the reasonable netizen who was of ordinary and average intelligence, fair-minded, not avid for scandal, not unduly suspicious, and one who understands colloquial Bahasa Malaysia with a spattering of English. Secondly, the postings indicated that the plaintiff was not just present at the birth, but that she
H was attending to PW2 as a *doula*, when the baby had died. Thirdly, the postings referred to the plaintiff as a liar and sinner. Lastly, the postings, had also made references to the fact that the plaintiff was responsible for the death of the baby (see paras 16–20).

I (2) In relation to the second contention, the defendant was splitting hairs in interpreting the meaning of 'melibatkan', as those words undoubtedly were indicative of the plaintiff's responsibility for the death of the baby. With regard to the third contention, the court agreed that the postings should be read as a whole. By reading the postings holistically, although in colloquial Bahasa Malaysia, they were crystal clear and indicative that

the plaintiff was indeed present and had attended as a *doula*, to the birth of PW2's baby, and was eventually responsible for the baby's death. There was nothing in the postings that reduced or eliminated the sting of its plain and ordinary meaning. Therefore, the words used had undoubtedly lowered the plaintiff in the estimation of right-thinking members of society generally, which in this case were reasonable and fair-minded netizens (see paras 21–24).

(3) The fourth contention was misconceived as the contents of the postings that were in issue in this claim, were the averments that the plaintiff was not only present, but was present as a *doula* who had attended to the delivery of the baby and eventually caused his death. The version in the police report lodged by the plaintiff was, in fact, the same version given by PW2, that was, that the plaintiff had merely visited PW2, not as a *doula* but as a friend. Incidentally, it was just before the plaintiff's visit that PW2 had unexpectedly delivered, and hence, the plaintiff rendered her assistance. The police report, therefore, was definitely not an admission by the plaintiff of the truth of the contents of the postings. In any event, 'the first information report' was not an Encyclopaedia. It was wrong to hold up the first information report as a sure touchstone by which the complainant's credit may invariably be impeached (see paras 30–31).

(4) The fifth contention was untenable since the defendant had failed to prove the truth of the words in the postings, namely that the plaintiff had attended to PW2 as a *doula*, and was responsible for the death of the baby. In this case, the parts of the postings that the defendant had failed to prove, had completely destroyed the plaintiff's reputation. As such, reliance on s 8 of the DA was flawed. Further, PW2 had made it very clear that the plaintiff had not attended to the birth as a *doula*, but merely as a friend, and that PW2 was never her client, since the plaintiff had nothing to do with PW2's choice of remaining at home despite experiencing initial contractions. In contrast to the witnesses produced by the plaintiff who gave direct evidence based on their personal knowledge, the defendants' witnesses testified that they were not present at the material time and had no personal knowledge of the incident. In totality, the defendant had failed to prove the truth of the contents of the postings and as such, failed in her defence of justification (see paras 34–37).

(5) On the assessment and evaluation of PW2, the court found her to be forthright, and she did not attempt to embellish or varnish her testimony. In fact, as the mother of the baby who had died, PW2's testimony was the best evidence, as it was direct and based on her personal knowledge, pursuant to s 60 of the Evidence Act 1950. Furthermore, PW2's evidence was corroborated by her husband, PW3 who was present throughout the incident. There was no basis to disbelieve both PW2 and PW3, as they

would have had no reason whatsoever to fabricate or concoct evidence. The plaintiff herself was also direct and truthful. Her evidence was corroborated by both PW2 and PW3, and the court had no basis to disbelieve her. In respect of the defendant, at the expense of proving her point in court, she had contradicted herself on several occasions. The court took a dim view of both her demeanour as well as her testimony in court, which was laced with patronising and caustic undertones, as she even suggested that PW2 was not telling the truth. As such, both her credit and credibility were severely compromised (see paras 42–43, 45 & 47).

(6) The word 'fair' in fair comment signified an absence of malice. In the present case, the defendant had abstained from inquiring into facts, something which, if done, would have provided an accurate account of the baby's death and as such, had failed to establish an absence of malice. The defendant admitted that the contents of the postings were derived from information provided by third parties but the defendant failed to provide the details of the third parties and failed to verify the information. In addition, the defendant's argument that the postings were made based on the information she derived from the patient progress note and home-birth case report prepared by one Dr Shahrul Azwan Azhari ('Dr Shahrul') and a nurse, one Hafidza Hashim respectively was untenable because PW2 testified that she was unsure about Dr Shahrul, and that she had neither been shown nor had verified any information documented in the patient progress note and as for the home-birth case report, the information contained in this document had actually supported the version of events provided by PW2 (see paras 51–58).

(7) Both Dr Shahrul and Hafidza Hashim who were not present in court to verify the contents of the patient progress note and home-birth case report were material witnesses to the facts of the present case as they would have been able to lend credence to the defendant's narrative that she had relied on the contents of these documents, which she averred was the truth. Their testimony would have been the best evidence. There was no explanation proferred for the absence of both Dr Shahrul and Hafidza Hashim, leading to the inference that there was deliberate withholding of the witnesses. The failure to call Dr Shahrul and Hafidza Hashim resulted in the invocation of an adverse inference against the defendant. Further, the patient progress note was unreliable because it was hearsay as its maker was not called as a witness (see paras 59, 62–63 & 65–66).

(8) In the final analysis, the defendant had deliberately abstained from inquiring into the facts, and based on her demeanour and testimony in court, she was not interested in the truth of what had actually transpired on the night of 4 February 2018. Pursuant to the accounts given by the

plaintiff's witnesses, the actual version had been scrambled by the defendant to the extent that it was furthest from the truth. Malice was, therefore, not negated and as such, the defence of fair comment had failed, as the comments which were based on falsity, were enveloped in bad faith, and not made in the interest of the public (see para 71).

(9) The falsity of the postings was exacerbated by its contents of which were grave in nature. The plaintiff had been accused of not only lying but of committing the most heinous crime. The defendant had left an indelible stain on the reputation of the plaintiff, and whatever monetary compensation awarded to the plaintiff would never be able to restore her reputation fully. The court, therefore, saw it befitting that the plaintiff should be awarded a sum of MYR100,000 for general damages (see para 83).

(10) The court found the conduct of the defendant most indecorous. She not only published the postings, she also responded to the comments made as a result of the postings, with responses that were accusatory, and downright vicious. The defendant, not only maligned and vilified the plaintiff, she had in actual fact launched a smear campaign against the plaintiff which made the latter a victim of cyber-bullying. The court could not turn a blind eye to the activities of quidnuncs, since the moment false news was released into the wilderness of the world wide web, that bell could not be un-rung. In light of such indecorous conduct of the defendant, which could never be condoned by the court, the court was of the view that an award of RM100,000 for exemplary/punitive damages was reasonable, fair and just (see paras 87 & 93).

(11) In addition to general and exemplary damages, the defendant was ordered, pursuant to O 45 r 5 of the Rules of Court 2012, to post an apology on the Facebook timelines of both the plaintiff and defendant, within seven days of the decision of the court, and for such apology to remain at such timelines for six months. The court was unable to agree with the defendant that an apology was not an appropriate remedy in this case. The defendant was also ordered to refrain from publicly commenting on any matter relating to the death of the baby on 4 February 2018. This order was appropriate as it was not prejudicial to the defendant, and more importantly, it would provide closure to the matter (see paras 94–95).

[Bahasa Malaysia summary

Plaintif dalam kes ini adalah seorang *doula* atau peneman kelahiran manakala defendan adalah seorang doktor. Plaintif telah memfailkan tuntutan bagi menuntut ganti rugi terhadap defendan atas dakwaan pernyataan fitnah yang telah disiarkan oleh defendan di akaun Facebooknya. Kenyataan tersebut dibuat oleh defendan pada 7, 8 dan 12 Februari 2018 setelah seorang bayi yang

dilahirkan melalui kelahiran dalam air oleh seorang Norizatul Amira Kamsan ('PW2'), telah meninggal dunia pada 4 Februari 2018. Hantaran Facebook tersebut telah dipadam pada sekitar bulan Ogos atau September 2018, setelah tindakan ini dimulakan pada 10 Ogos 2018. Fakta bahawa pernyataan tersebut diterbitkan oleh defendan, dan bahawa pernyataan tersebut merujuk kepada plaintif tidak dipertikaikan. Hujahan defendan adalah bahawa kandungan hantaran tersebut bukan fitnah, dan jika benar pun, pembelaan justifikasi dan komen yang adil telah dibuktikan. Defendan berhujah bahawa: (a) kandungan hantaran tersebut hanya menyatakan bahawa plaintif telah hadir semasa kelahiran bayi tersebut, dan bahawa dia telah berbohong mengenai hal itu, dan tidak lebih dari itu ('hujahan pertama'); (b) perkataan yang digunakan dalam hantaran tersebut adalah 'melibatkan' dan 'terlibat', yang hanya merujuk kepada penglibatan plaintif dalam kematian bayi tersebut, dan bukan penyertaan langsungnya ('hujahan kedua'); dan (c) daripada membaca hantaran tersebut secara holistik, plaintif telah memilih perkataan-perkataan tertentu diluar konteks ayat tersebut, untuk menyimpulkan bahawa hantaran tersebut adalah fitnah ('hujahan ketiga'). Berkaitan dengan pembelaan justifikasi, defendan berhujah bahawa: (i) kandungan laporan polis plaintif adalah pengakuan oleh plaintif terhadap fakta-fakta yang terkandung dalam hantaran tersebut ('hujahan keempat'); dan (ii) berdasarkan s 8 Akta Fitnah 1957 ('AF'), pembelaannya tetap terpakai walaupun kebenaran setiap dakwaan tidak dibuktikan ('hujahan kelima'). Mengenai pembelaan komen yang adil, isu dasar yang harus ditentukan adalah sama ada defendan sebenarnya tidak meneliti fakta, sesuatu yang, jika dilakukan, akan memberikan penjelasan yang tepat mengenai kematian bayi tersebut.

Diputuskan, membenarkan tuntutan plaintif dengan kos RM30,000 tertakluk kepada bayaran alokatur:

(1) Mahkamah tidak bersetuju dengan hujahan pertama kerana sangat jelas bahawa hantaran tersebut dipenuhi dengan ucapan yang tidak hanya meremehkan, tetapi juga menuduh. Pertama, hashtag #doulakeji digunakan, dengan merujuk kepada keji. Perkataan 'keji' adalah bahasa yang digunakan secara bergantian dengan 'kejahatan', 'sangat teruk', dan 'kejam', yang cukup jelas bagi orang biasa. Orang biasa merujuk kepada netizen yang berakal yang mempunyai kepandaian biasa dan purata, berfikiran adil, tidak suka skandal, tidak curiga, dan orang yang memahami dengan fasih Bahasa Malaysia dan sebahagian Bahasa Inggeris. Keduanya, hantaran tersebut menunjukkan bahawa plaintiif tidak hanya hadir pada saat kelahiran, tetapi bahawa dia mendatangi PW2 sebagai *doula*, ketika bayi tersebut meninggal dunia. Ketiga, hantaran tersebut merujuk kepada plaintif sebagai pembohong dan pendosa. Terakhirnya, hantaran tersebut juga merujuk kepada fakta bahawa plaintif bertanggung jawab atas kematian bayi tersebut (lihat perenggan 16–20).

(2) Berkaitan dengan hujahan kedua, defendan hanyalah mempertikaikan perbezaan yang sangat kecil dalam menafsirkan maksud 'melibatkan', kerana perkataan tersebut tidak diragukan lagi menunjukkan tanggungjawab plaintif terhadap kematian bayi tersebut. Berkenaan dengan hujahan ketiga, mahkamah setuju bahawa hantaran tersebut harus dibaca secara keseluruhan. Dengan membaca hantaran tersebut secara holistik, walaupun dalam Bahasa Malaysia, hantaran tersebut jelas dan menunjukkan bahawa plaintif sememangnya hadir dan telah hadir sebagai *doula*, sehingga kelahiran bayi PW2, dan seterusnya bertanggung jawab atas kematian bayi tersebut. Tidak ada apa-apa dalam hantaran tersebut yang mengurangkan atau menghilangkan maksud biasa hantaran tersebut. Oleh itu, kata-kata yang digunakan sudah pasti menjatuhkan plaintif dalam pemikiran anggota masyarakat yang berfikiran waras pada umumnya, yang dalam hal ini adalah netizen yang wajar dan berfikiran adil (lihat perenggan 21–24).

(3) Hujahan keempat tidak masuk akal kerana kandungan hantaran yang menjadi isu dalam tuntutan ini, adalah penegasan bahawa plaintif tidak hanya hadir, tetapi hadir sebagai *doula* yang telah menyambut kelahiran bayi dan akhirnya menyebabkan kematiannya. Versi dalam laporan polis yang dikemukakan oleh plaintif, sebenarnya, versi yang sama diberikan oleh PW2, iaitu, bahawa plaintif hanya mengunjungi PW2, bukan sebagai *doula* tetapi sebagai rakan. Secara kebetulan, tepat sebelum kunjungan plaintif PW2 melahirkan bayi tersebut, dan oleh itu, plaintif telah memberikan bantuannya. Oleh itu, laporan polis tersebut sudah semestinya bukan pengakuan oleh plaintif mengenai kebenaran kandungan hantaran tersebut. Walau bagaimanapun, 'laporan maklumat pertama' bukanlah Ensiklopedia. Adalah salah untuk menyimpulkan bahawa laporan maklumat pertama sebagai satu standard yang pasti di mana kredit pengadu kebiasaannya boleh disekat (lihat perenggan 30–31).

(4) Hujahan kelima tidak dapat dipertahankan kerana defendan gagal membuktikan kebenaran ayat dalam hantaran tersebut, iaitu bahawa plaintif telah mendatangi PW2 sebagai *doula*, dan bertanggung jawab atas kematian bayi tersebut. Dalam kes ini, bahagian hantaran tersebut yang gagal dibuktikan oleh defendan, telah merosakkan reputasi plaintif sepenuhnya. Oleh itu, pergantungan pada s 8 dari AF adalah tidak tepat. Selanjutnya, PW2 telah menyatakan dengan jelas bahawa plaintif bukannya hadir semasa kelahiran bayinya sebagai *doula*, tetapi hanya sebagai rakan, dan bahawa PW2 tidak pernah menjadi pelanggannya, kerana plaintif tidak ada kaitan dengan pilihan PW2 untuk tinggal di rumah walaupun mengalami kontraksi awal. Berbeza dengan saksi-saksi yang dikemukakan oleh plaintif yang memberikan keterangan langsung berdasarkan pengetahuan peribadi mereka, saksi-saksi defendan memberi keterangan bahawa mereka tidak hadir pada waktu material

dan tidak mempunyai pengetahuan peribadi mengenai kejadian tersebut. Secara keseluruhan, defendan gagal membuktikan kebenaran kandungan hantaran tersebut dan dengan demikian, gagal dalam pembelaan justifikasi (lihat perenggan 34–37).

(5) Berdasarkan penilaian dan penelitian terhadap PW2, mahkamah mendapati dia seorang yang benar, dan dia tidak berusaha untuk memperindah atau menokok tambah keterangannya. Sebenarnya, sebagai ibu bayi yang telah meninggal dunia, testimoni PW2 adalah keterangan terbaik, kerana ia adalah keterangan langsung dan berdasarkan pengetahuan peribadinya, berdasarkan s 60 Akta Keterangan 1950. Selanjutnya, keterangan PW2 disahkan oleh suaminya, PW3 yang hadir sepanjang kejadian tersebut. Tidak ada dasar untuk tidak mempercayai kedua-dua PW2 dan PW3, kerana mereka tidak mempunyai alasan untuk memalsukan keterangan atau mencipta keterangan baru. Plaintif sendiri juga luhur dan jujur. Keterangannya disahkan oleh PW2 dan PW3, dan mahkamah tidak mempunyai asas untuk tidak mempercayainya. Mengenai defendan, bagi membuktikan kesnya di mahkamah, dia telah beberapa kali memberi keterangan yang bertentangan dengan pendiriannya sendiri. Mahkamah mempunyai pandangan yang negatif terhadap sikapnya dan juga kesaksiannya di mahkamah, yang mencerminkan nada yang sombong dan kaustik, kerana dia bahkan mencadangkan bahawa PW2 tidak bercakap benar. Berdasarkan dapatan di atas, kedua-dua kredit dan kredibilitinya terjejas teruk (lihat perenggan 42–43, 45 & 47).

(6) Perkataan 'adil' dalam komen yang adil menandakan tidak terdapat niat jahat. Dalam kes ini, defendan tidak meneliti fakta, sesuatu yang, jika dilakukan, akan memberikan penjelasan yang tepat mengenai kematian bayi tersebut dan dengan demikian, gagal membuktikan tidak adanya niat jahat. Defendan mengakui bahawa kandungan hantaran tersebut dibuat berdasarkan maklumat yang diberikan oleh pihak ketiga tetapi defendan gagal memberikan perincian pihak ketiga dan gagal mengesahkan maklumat tersebut. Selain itu, hujah defendan bahawa hantaran tersebut dibuat berdasarkan maklumat yang dia perolehi dari catatan kemajuan pesakit dan laporan kes kelahiran di rumah yang disiapkan oleh seorang Dr Shahrul Azwan Azhari ('Dr Shahrul') dan seorang jururawat, Hafidza Hashim adalah tidak dapat dipertahankan kerana PW2 memberi keterangan bahawa dia tidak yakin dengan Dr Shahrul, dan bahawa dia tidak ditunjukkan atau tidak mengesahkan maklumat yang didokumentasikan dalam catatan kemajuan pesakit dan berkaitan dengan laporan kes kelahiran di rumah, maklumat yang terdapat dalam dokumen ini sebenarnya menyokong versi kejadian yang dinyatakan oleh PW2 (lihat perenggan 51–58).

(7) Kedua-dua Dr Shahrul dan Hafidza Hashim yang tidak hadir di

mahkamah untuk mengesahkan kandungan laporan kemajuan pesakit dan laporan kes kelahiran di rumah adalah saksi penting terhadap fakta kes ini kerana mereka akan dapat memberi kredibiliti kepada naratif defendan bahawa dia bergantung pada kandungan dokumen-dokumen ini, yang menurutnya adalah benar. Testimoni mereka akan menjadi keterangan terbaik. Tidak ada penjelasan mengenai ketidakhadiran Dr Shahrul dan Hafidza Hashim, yang menyebabkan timbulnya inferens bahawa terdapat penahanan saksi yang disengajakan. Kegagalan memanggil Dr Shahrul dan Hafidza Hashim mengakibatkan inferens bertentangan dibuat terhadap defendan. Selanjutnya, laporan kemajuan pesakit tidak boleh dipercayai kerana ia adalah keterangan dengar cakap memandangkan pembuatnya tidak dipanggil sebagai saksi (lihat perenggan 59, 62–63 & 65–66).

(8) Dalam analisis terakhir, defendan telah dengan sengaja tidak meneliti fakta, dan berdasarkan sikap dan keterangannya di mahkamah, dia tidak berminat terhadap kebenaran mengenai apa yang sebenarnya terjadi pada malam 4 Februari 2018. Menurut keterangan-keterangan yang diberikan oleh saksi-saksi plaintif, versi asal telah diubah oleh defendan sehingga ianya terlampau jauh dari kebenaran. Oleh itu, niat jahat tidak dapat disangggah dan dengan demikian, pembelaan komen yang adil telah gagal dibuktikan, kerana komen yang didasarkan pada sesuatu yang tidak benar, diselimuti dengan niat buruk, dan tidak dibuat untuk kepentingan awam (lihat perenggan 71).

(9) Ketidakbenaran hantaran tersebut diburukkan lagi dengan kandungannya yang sangat serius. Plaintif bukan sahaja dituduh berbohong malahan melakukan jenayah yang paling keji. Defendan telah meninggalkan noda kekal ke atas reputasi plaintif, dan apa pun pampasan wang yang diberikan kepada plaintif tidak akan dapat mengembalikan reputasinya sepenuhnya. Oleh itu, mahkamah mendapati bahawa adalah wajar plaintif diberikan sejumlah RM100,000 untuk ganti rugi am (lihat perenggan 83).

(10) Mahkamah mendapati tindakan defendan adalah sangat tidak wajar. Dia bukan hanya menerbitkan hantaran tersebut, dia juga memberi respon kepada komen yang dibuat yang berpunca dari hantaran tersebut, dengan respon yang menuduh, dan benar-benar jahat. Defendan bukan hanya memfitnah dan memburuk-burukkan plaintif, malahan sebenarnya telah melancarkan kempen untuk menjatuhkan plaintif yang menyebabkan plaintif menjadi mangsa buli siber. Mahkamah tidak boleh menutup sebelah mata terhadap kegiatan pembuat khabar angin, memandangkan apabila berita palsu dikeluarkan ke lapangan *world wide web*, ia tidak boleh ditarik balik. Mengambil kira tindakan defendan yang tidak wajar tersebut, tindakan yang tidak akan dapat diterima oleh mahkamah, mahkamah berpendapat bahawa pemberian RM100,000

untuk ganti rugi teladan/punitif adalah wajar, adil dan saksama (lihat perenggan 87 & 93).

(11) Sebagai tambahan kepada ganti rugi am dan teladan, defendan diperintahkan, menurut A 45 k 5 Kaedah-Kaedah Mahkamah 2012, untuk membuat hantaran permintaan maaf pada garis masa Facebook kedua-dua pihak plaintif dan defendan, dalam masa tujuh hari dari keputusan mahkamah, dan agar permintaan maaf tersebut kekal dalam jangka masa selama enam bulan. Mahkamah tidak dapat bersetuju dengan defendan bahawa permintaan maaf bukanlah remedi yang tepat dalam kes ini. Defendan juga diperintahkan untuk tidak memberi komen secara terbuka mengenai apa-apa perkara yang berkaitan dengan kematian bayi pada 4 Februari 2018. Perintah ini adalah wajar kerana ia tidak memudaratkan defendan, dan yang lebih penting, ia akan memberikan pengakhiran kepada perkara dalam kes ini (lihat perenggan 94–95).]

Cases referred to

Abdul Rahman Talib v Seenivasagam & Anor [1966] 2 MLJ 66; [1964] 1 LNS 2, FC (refd)

Adel Muhammed El Dabbah v AG for Palestine [1944] AC 156 (refd)

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315; [1989] 1 CLJ 152, HC (refd)

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62, CA (folld)

Chan Yoke Lain (administrator of the estate of Chong Yoke Fah, deceased) v Pacific & Orient Insurance Co Sdn Bhd [1999] 1 MLJ 303, CA (refd)

Chin Choon @ Chin Tee Fut v Chua Jui Meng [2005] 3 MLJ 494, CA (refd)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371; [1999] 1 CLJ 461; [1999] 1 AMR 753, CA (refd)

Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor [2014] 3 CLJ 560; [2014] 4 MLJ 242, CA (refd)

Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Nurul Izzah bt Anwar & Anor [2018] 3 MLJ 726, CA (refd)

Dato' Seri Anwar bin Ibrahim v Khairy Jamaluddin [2017] MLJU 1495; [2018] 3 CLJ 250, HC (refd)

Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor [2010] 2 MLJ 492; [2010] 5 CLJ 301, HC (refd)

Datuk Seri Anwar bin Ibrahim v Wan Muhammad Azri bin Wan Deris [2014] 9 MLJ 605; [2014] 1 LNS 662, HC (refd)

Dato' Sri Mohd Najib bin Tun Hj Abdul Razak & Anor v Mohd Rafizi Ramli and another appeal [2018] 1 MLJ 295, CA (refd)

Datuk May Phng @ Cho Mai Sum (suing as chairman, committee member and representative of Persatuan Penganut Buddha Rumah Kechara Malaysia ('Kechara House'), an association registered under the Societies Act 1966 and in the capacity of representative of Kechara House and/or all Kechara House's

members) & Ors v Tan Pei Pei [2018] 11 MLJ 741, HC (folld)
Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors [2012] 4 MLJ 191; [2012] 1 LNS 1359, CA (refd)
Herchun Singh & Ors v Public Prosecutor [1969] 2 MLJ 209, FC (refd)
JB Jeyaratnam v. Goh Chok Tong [1985] 3 MLJ 334
Jones v Skelton [1963] 3 All ER 952, PC (folld)
Keluarga Communication v Normala Samsudin [2006] 2 MLJ 700; [2006] 2 CLJ 46; [2006] 2 AMR 604, CA (refd)
Rubber Improvement Ltd v Daily Telegraph Ltd [1964] AC 234, HL (refd)
Marappan a/l Muthusamy v R Sivam a/l Ramasamy [2014] 4 MLJ 428, CA (refd)
McAllister v Campbell [2014] NIQB 24, QBD (refd)
Munusamy v Public Prosecutor [1987] 1 MLJ 492, SC (refd)
Murugan v Lew Chu Cheong [1980] 2 MLJ 139, FC (refd)
Public Prosecutor v Krishna Rao a/l Gurumurthi & Ors [2000] 1 MLJ 274, HC (refd)
Pang Ah Chee v Chong Kwee Sang [1985] 1 MLJ 153, FC (refd)
Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd [1986] 2 MLJ 30, SC (refd)
R v Sweet-Escott (1971) 55 Cr App Rep 316 (refd)
Rookes v Barnard [1964] 1 All ER 367, HL (refd)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173, SC (folld)
Sabah Shell Petroleum Co Ltd & Anor v The Owners of and/or Any Other Persons Interested in the Ship or Vessel the 'Borcos Takdir' [2012] 5 MLJ 515, HC (refd)
Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784; [2017] 1 LNS 500, CA (refd)
Sean Thornton (a minor by his mother and next friend) v Northern Ireland Housing Executive [2010] NIQB 4, QBD (folld)
Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56 (refd)
Tan Ah Hong v CTOS Data System Sdn Bhd [2016] MLJU 504; [2016] 1 LNS 90, CA (refd)
Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors [2019] 1 MLJ 421; [2019] 2 CLJ 261, CA (refd)
Tun Datuk Patinggi Haji Abdul-Rahman Ya'Kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393; [1995] 1 LNS 304, HC (folld)
Utusan Melayu (M) Bhd v Othman bin Hj Omar [2017] 2 MLJ 800; [2017] 2 CLJ 413, CA (refd)
Viking Life-Saving Equipment Pte Ltd lwn Port Marine Safety Services Sdn Bhd [2013] 9 MLJ 111, HC (refd)
Yeo Ing King v Melawangi Sdn Bhd [2016] 5 MLJ 631, CA (folld)
Yokomasu Marketing Sdn Bhd & Anor v Chor Tse Min [2018] 2 MLJ 654, CA (refd)

Legislation referred to

Defamation Act 1957 ss 8, 9
Evidence Act 1950 ss 57, 60, 103, 114, 114(g), 114A, 146
Rules of Court 2012 O 45 r 5

Irna Shahana bt Shamsudin (Nur Izzaida bt Zamani with her) (CK Ling, Izzaida & Irna) for the plaintiff.
Idza Hajar bt Ahmad Idzam (Nan Muhammad Ridhwan bin Rosnan and Nur Fatin Hafiza bt Hasham with her) (Zul Rafique & Partners) for the defendant.

Evrol Mariette Peters JC:

INTRODUCTION

[1] This is the plaintiff's claim ('this claim') for damages against the defendant for alleged defamatory statements that the latter had posted on her Facebook account.

THE BACKGROUND FACTS

[2] Although this is a dispute between a *doula* and a doctor, it must be underscored at the outset that the disagreement had nothing whatsoever to do with whether medically unsupervised home-births should be condoned or condemned, but rather if the doctor was justified in her statements regarding the *doula*.

[3] The plaintiff, known also as *DoulaMas*, is a *doula*, or birth companion, who not only offered personalised ante-natal and post-natal care advice relating to natural childbirth, she also conducted courses on how to handle the challenges pertaining to natural childbirth.

[4] The defendant is a medical doctor employed by the Ministry of Health Malaysia, and at the material time , was the owner of a Facebook account by the name of 'Sakinah Sulong'.

[5] On 4 February 2018, a baby born via a home water birth to one Norizatul Amira Kamsan ('PW2'), had died. As a result thereof, on 7, 8 and 12 February 2018, the following statements (collectively 'the postings') were published by the defendant:

7 February 2018

... Dalam kes yang baru berlaku, korang jangan tanya di mana dan siapa yang terlibat. Ibunya walaupun mulutnya kata redha, saya pasti malamnya pasti dikejar mimpi. Hatinya pasti diulit sepi. Doula yang dikaitkan dalam memberi ajaran mmg sah Doula Masyitah. Ini mmg kawasan operasi dia. Dia mungkin nak menafikan

tapi jangan lupa, CCTV ada di hospital. Ada juga saksi yang Nampak dia di bilik saringan ibu bersama bapa bayi berkenaan pada malam tersebut. Betul ke dia cakap kat rumah?

** ** **

8 February 2018

Saya memang MARAH hari ni!

Pertama, marah ngan #doulakeji tu.

Dah sah2 dia yang attend kes water birth kat rumah klien dia, dia boleh nafi pulak.

Habih kekawan/klien dia back up dia kononnya dia ni kena fitnah. Kononnya dia elok duduk kat rumah pada malam kejadian.

Aik, BERBOHONG tu kan berdosa.

Dah terang2 u were there masa ambulans datang nak selamatkan baby tu.

U even followed them ke hospital. Jangan nak berdalih, ada ramai saksi kat hospital. CCTV pun ada. Entah2 solat Maghrib pun tak sempat kan?

Pelik la, u are heavily pregnant now. Tak takut ke Allah bayar cash to u. hasil perbuatan dan pembohongan u tu? Yakin sangat ke yg ur husband tu boleh conduct d delivery kali ni tanpa sebarang masalah walaupun dia dah berjaya sblm ni?

Remember, health staffs yg jaga area u will be reminded to be alert if ada unexpected emergency.

** * ***

12 February 2018

A LIAR will have a hard time keeping the line between the truth and the lies.

Saya terpaksa berkongsi cerita kerana saya TIDAK MAHU seorang yang berimej Islamik, melakukan satu kesalahan dan sesedap rasa menafikannya tanpa rasa bersalah. Dia perlu DIHENTIKAN.

Gambar pertama saya terima pada 6hb di mana Masyitah memberitahu salah seorang bekas kliennya yang dia tidak berada di tempat berkenaan. Gambar kedua, yang sempat saya ss, kenyataan daripada group kliennya sehari selepas itu. Bukan sahaja dia menafikan dia ada di sana, tapi dia katanya tidak terlibat langsung kes ini sedangkan ibu ini memang sah salah seorang klien dia.

Tup tup, dalam kenyataan di fb pada 8hb, terang terang dia mengaku secara tidak langsung yang dia terlibat.

Untuk penyokong Masyitah, saya percaya anda semua bijak. Dan sama sekali takkan bersekongkol dengan kemungkaran. Hatta satu penipuan, apatah lagi yang melibatkan satu kematian ...

... Kes baby mati yg conducted by doula masyitah tu betul ke kejadian tu? Kwn saya kata kes tu pun xde ... masyitah denied about this ... dia nk buat polis report kunun ...

Salam, ada org cam dia kat rumah patient ... yg pernah bersalin kat rumah tu ...

[6] A letter of demand dated 10 July 2018 was issued to the defendant by the plaintiff's solicitors, but the defendant had failed to respond to the same. The postings, however, were deleted sometime in August or September 2018, after this action was instituted on 10 August 2018.

[7] This claim was allowed for the following reasons.

THE APPLICABLE LAW

[8] It is trite law, restated in numerous cases including *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315; [1989] 1 CLJ 152, that the following elements must be proved by the plaintiff to establish a case of defamation:

(a) the plaintiff must show that the statement bears defamatory imputations;

(b) the statement must refer to or reflect upon the plaintiff's reputation; and

(c) the statement must have been published to a third person by the defendant

CONTENTIONS, EVALUATION, AND FINDINGS

[9] The facts that the statements were published by the defendant, and that they referred to the plaintiff were not in dispute. The nub of the defendant's contention was that the contents of the postings were not defamatory, and even if they were, the defences of justification and fair comment had been established.

Whether the postings were defamatory

[10] In *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371; [1999] 1 CLJ 461; [1999] 1 AMR 753, the Court of Appeal laid down the test to be undertaken by the trial judge in determining whether the impugned words are defamatory. The test, which is a two-staged one, was explained by Gopal Sri Ram JCA (as he then was) as follows:

> It cannot, I think, be doubted that the *first task of a court in an action for defamation is to determine whether the words complained of are capable of bearing a defamatory meaning* ...
>
> Having decided whether the words complained of are capable of bearing a defamatory meaning, *the next step in the inquiry is for a court to ascertain whether the words complained of are in fact defamatory*. This is a question of fact dependent upon the circumstances of the particular case. (Emphasis added.)

[11] The two-stage test in *Chok Foo Choo* has been cited with approval in a

plethora of cases including *Yokomasu Marketing Sdn Bhd & Anor v Chor Tse Min* [2018] 2 MLJ 654, *Dato' Seri Anwar bin Ibrahim v Khairy Jamaluddin* [2017] MLJU 1495; [2018] 3 CLJ 250, *Utusan Melayu (M) Bhd v Othman bin Hj Omar* [2017] 2 MLJ 800; [2017] 2 CLJ 413, and *Tan Ah Hong v CTOS Data System Sdn Bhd* [2016] MLJU 504; [2016] 1 LNS 90.

[12] Although what is defamatory depends on the circumstancs of the particular case, in *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56, Mohd Azmi J (as he then was) laid down the test as follows:

> Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: *would the words tend to lower the plaintiff in the estimation of right thinking members of society generally*? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty. (Emphasis added.)

[13] Reference is made also to the Court of Appeal case of *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371; [1999] 1 CLJ 461; [1999] 1 AMR 753, where in approving and adopting the cases of *Tun Datuk Patinggi Haji Abdul-Rahman Ya'Kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393; [1995] 1 LNS 304 and *JB Jeyaratnam v Goh Chok Tong* [1985] 3 MLJ 334, it was stated by Gopal Sri Ram JCA (as he then was):

> In my judgment, the test which is to be applied lies in the question: do *the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity* on his part? (Emphasis added.)

[14] The further issue arising from the test expounded above is from whose perspective the impugned statements are assessed. The description of the assessor was provided by the House of Lords in *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234, in the following passage:

> There is no doubt that in actions for libel *the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense.* The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So *he can and does read between the lines* in the light of his general knowledge and experience of world af fairs.
>
> What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or a murderer. *But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them*, and that is also regarded as part of their natural and ordinary meaning. (Emphasis added.)

[15] I also found instructive the case of *Jones v Skelton* [1963] 3 All ER 952, where it was stated by Lord Morris:

> The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words (see *Lewis v Daily Telegraph Ltd* [1963] 2 All ER 151). *The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words.* The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense. (Emphasis added.)

[16] Although the assessor is the ordinary man who has been described as the ubiquitious reasonable man on the Clapham omnibus, in my view, it is time to let go of the relic of the past, and in this case, to look to the reasonable netizen who is of ordinary and average intelligence (*Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492; [2010] 5 CLJ 301); fair-minded, not avid for scandal, not unduly suspicious (*Datuk Seri Anwar bin Ibrahim v Wan Muhammad Azri bin Wan Deris* [2014] 9 MLJ 605; [2014] 1 LNS 662), and one who understands colloquial Bahasa Malaysia with a spattering of English.

[17] The defendant did not deny publishing the postings but contended that the contents of the same had conveyed merely that the plaintiff had been present at the birth of the baby, and that she had lied about that, and nothing more. I am unable to agree with this submission as it was very clear that the postings were littered with remarks that were not only disparaging, but accusatory as well. For instance, the hastag *#doulakeji* was used, with 'keji' referring to vile. The word 'vile' is a parlance used interchangeably with 'evil', 'abominable', and 'vicious', which were sufficiently clear to the ordinary man.

[18] Secondly, the postings indicated that the plaintiff was not just present at the birth, but that she was attending to PW2 as a *doula*, when the baby had died, as published in the following statement:

> Dah sah2 dia yang *attend kes water birth kat rumah klien dia*, dia boleh nafi pulak.

[19] Thirdly, the postings referred to the plaintiff as a liar and sinner, in particular the following statement:

> Aik, *BERBOHONG tu kan berdosa*.
>
> ...

A LIAR will have a hard time keeping the line between the truth and the lies

[20] The postings, had also made references to the fact that the plaintiff was responsible for the death of the baby, in the following:

> saya TIDAK MAHU seorang yang berimej Islamik, *melakukan satu kesalahan* dan sesedap rasa menafikannya tanpa rasa bersalah. Dia perlu DIHENTIKAN.
>
> Hatta satu penipuan, *apatah lagi yang melibatkan satu kematian* ...
>
> ... *Kes baby mati yg conducted by doula* masyitah tu betul ke kejadian tu?

[21] The defendant contended that the words used in the postings were 'melibatkan' and 'terlibat', which referred only to the plaintiff's involvement in the death of the baby, and not her direct participation. In my view, the defendant was splitting hairs in interpreting the meaning of 'melibatkan', as those words undoubtedly were indicative of the plaintiff's responsibility for the death of the baby.

[22] She further argued that instead of reading the postings holistically, the plaintiff had cherrypicked out of context specific words, to conclude that they were defamatory. I agree that the postings should be read as a whole. The manner in which the impugned statements should be read was explained in *Keluarga Communication v Normala Samsudin* [2006] 2 MLJ 700; [2006] 2 CLJ 46; [2006] 2 AMR 604, where the Court of Appeal held that when considering whether a statement is defamatory, it is necessary to consider the article as a whole. Zulkefli Ahmad Makinuddin JCA (as he then was) in delivering the judgment of the Court of Appeal held:

> At the outset we would state that the test to be applied when considering whether a statement is defamatory of a plaintiff is well settled in that it is an objective one in which it must be given a meaning a reasonable man would understand it and for that purpose, that is, in considering whether the words complained of contained any defamatory imputation, it is necessary to consider the whole article. *Gatley on Libel & Slander* (10th Ed) on this point at pages 108 and 110, inter alia, states as follows:
>
> > *It is necessary to take into consideration, not only the actual words used, but the context of the words*.
>
> If follows from the fact that the context and circumstances of the publication must be taken into account, that the plaintiff cannot pick and choose parts of the publication which, standing alone, would be defamatory. *This or that sentence may be considered defamatory, but there may be other passages which take away the sting.* (Emphasis added.)

[23] Based on the above authorities, and reading the postings holistically as contended by the defendant herself, although in colloquial *Bahasa Malaysia*,

A they were crystal clear and indicative that the plaintiff was indeed present and had attended as a *doula*, to the birth of PW2's baby, and was eventually responsible for the baby's death. There was nothing in the postings that reduced or eliminated the sting of its plain and ordinary meaning.

B **[24]** In my view, therefore, the words used had undoubtedly lowered the plaintiff in the estimation of right thinking members of society generally, which in this case were reasonable and fair-minded netizens.

C *Whether the defence of justification was proved*

[25] The defence of justification, which is a complete defence, is established when the defendant has proved the material aspects of the impugned statements.

D

[26] On this note, I found instructive the following enlightening passage by Richard Malanjum J (as he then was), in *Tun Datuk Patinggi Haji Abdul-Rahman Ya'Kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393; [1995] 1 LNS 304:

E

> In a defamation action, the defence of justification is a complete defence if it succeeds. And the question of malice or bad faith does not arise. *But in order to succeed in the defence of justification a defendant must establish the truth of all the material statements in the words complained of which may include defamatory comments made therein. And in order to justify such comments, it is necessary to show that the comments are the correct imputations or conclusions to be drawn from the proved facts.* (Emphasis added.)

F

[27] In *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 3 CLJ 560; [2014] 4 MLJ 242, the Court of Appeal explained that the burden of proving justification has to be discharged by the defendant on a balance of probabilities.

G

[28] The legal burden to prove justification is imposed on the defendant by virtue of s 103 of the Evidence Act 1950 ('the Evidence Act'), which reads:

H

> Section 103 — Burden of proof as to particular fact
>
> The burden of proof *as to any particular fact* lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. (Emphasis added.)

I

[29] The defendant had relied heavily on a police report that the plaintiff had lodged herself on 8 February 2018, and submitted that its contents were an admission by the plaintiff to the facts contained in the postings.

[30] In my view, this argument is misconceived as the contents of the postings that were in issue in this claim, were the averments that the plaintiff was not only present, but was present as a *doula* who had attended to the delivery of the baby and eventually caused his death. The version in the police report lodged by the plaintiff was, in fact, the same version given by PW2, that is, that the plaintiff had merely visited PW2, NOT as a *doula* but as a friend. Incidentally, it was just before the plaintiff's visit that PW2 had unexpectedly delivered, and hence, the plaintiff renderd her assistance. The police report, therefore, was definitely not an admission by the plaintiff of the truth of the contents of the postings.

[31] In any event, it is pertinent to note that 'the first information report is not an Encyclopaedia. It is not the beginning and ending of every case. It is only a complaint to set the affairs of law and order in motion. It is only at the investigation stage that all the details can be gathered and filled up. In short, it is wrong to hold up the first information report as a sure touchstone by which the compainant's credit may invariably be impeached. It can only be used for that purpose with discrimination, in much the same way as previous statements by the witness are used, so that irrelevant errors in detail are not given exaggerated importance, nor omissions, objectively considered in the light of surrounding circumstances:' per Ong Hock Thye (Malaya) CJ in *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209

[32] The defendant submitted that based on s 8 of the Defamation Act 1957 ('the Defamation Act'), her defence should still stand even if the truth of every charge is not proved. The provision reads:

> Section 8 – *Justification*
>
> In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, *a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation* having regard to the truth of the remaining charges. (Emphasis added.)

[33] However, the plea of justification does not fail 'by reason only that the truth of every charge is not proved, if the words not proved to be true do not materially injure the plaintiff's reputation, having regard to the truth of the remaining charges'. At this juncture, reference is made to *Abdul Rahman Talib v Seenivasagam & Anor* [1966] 2 MLJ 66; [1964] 1 LNS 2, where it was stated by Barakbah CJ (Malaya):

> At common law, under the plea of justification, the defendant must prove the truth of all material statements in the libel. There must be a substantial justification of the whole libel. If any material part were not proved true the plaintiff would be entitled to damages in respect of such part, provided, of course, that it would by itself form

A a substantial ground for an action for libel. By s 8 of the Defamation Ordinance, 1957, however, it is now provided that in an action for libel or slander in respect of words containing two or more distinct charges, *a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation*, having regard to the truth of the B remaining charges. (Emphasis added.)

[34] I found the defendant's argument untenable since she had failed to prove the truth of the words in the postings, namely that the plaintiff had attended to PW2 as a *doula*, and was responsible for the death of the baby. In C this case , the parts of the postings that the defendant had failed to prove, had completely destroyed the plaintiff's reputation. As such, reliance on s 8 of the Defamation Act was flawed.

D **[35]** Furthermore, and more importantly, PW2 herself gave a detailed account of what had actually transpired. She testified in court that on 4 February 2018, at about 5pm, she had started experiencing mild contractions, but had decided to remain at home for a little while longer. To reduce the pain, she sat on a gym ball and soaked in a portable pool at home. E She informed the court that everything she did pertaining to the birth was her choice and that at no time whatsoever, had she been influenced by the plaintiff. However, she did contact the plaintiff, and the plaintiff agreed to visit her before she left for the hospital. It was shortly after the *Maghrib* prayers that the birthing process had started, but as a result of a breech delivery, the baby F suffered a fetal head entrapment. It was at that time that the plaintiff had reached PW2's house, and according to PW2, since the baby was partially delivered, the plaintiff had assisted PW2 in breathing and pushing until the baby was wholly delivered. However, since there was no response from the baby, PW2's husband, one Muhamad Khairul Nizam bin Hamid ('PW3') G called for an ambulance and rushed PW2 and the baby to the hospital, accompanied by the plaintiff. PW2 had made it very clear that the plaintiff had not attended to the birth as a *doula*, but merely as a friend, and that PW2 was never her client, since the plaintiff had nothing to do with PW2's choice of remaining at home despite experiencing initial contractions.

H

[36] In contrast to the witnesses produced by the plaintiff who gave direct evidence based on their personal knowledge, the witnesses produced by the defendant, namely Norjuwita bt Jusoh (DW1), and Dr Nurul Ulum bt Ahmad I Yusuf (DW2), who rode in the ambulance that was used to transport PW2 to the hospital; and Dr Siti Sarah bt Ahmad Bashah (DW4), a colleague of the defendant, all testified that they were not present at the material time and had no personal knowledge of the incident.

[37] Taking into account all the evidence adduced by both the plaintiff and defendant, it was my finding that the defendant had failed to prove the truth of the contents of the postings and as such, failed in her defence of justification.

Credibility of witnesses

[38] It is trite law that a trier of fact must judicially appreciate the evidence led before him upon the issue called for resolution. I found instructive the following passage by Gopal Sri Ram JCA (as he then was) in *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62:

> A decision arrived in the absence of a judicial appreciation of evidence is liable to appellate correction. Judicial appreciation is concerned with the process of evaluating the evidence for the purpose of discovering where the truth lies in a particular case. It includes, but is not limited to, identifying the nature and quality of the evidence, assigning such weight to it as the trier of fact deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case and assessing the demeanour of witnesses.

[39] With regard to the credibility of witnesses, reference is made to s 146 of the Evidence Act, which reads:

> Section 146 — Questions lawful in cross-examination
>
> When a witness may be cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—
>
> (a) to test his accuracy, veracity or *credibility*;
>
> (b) to discover who he is and what is his position in life; or
>
> (c) to shake his *credit* by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture. (Emphasis added.)

[40] The distinction between credit and credibility, both of which are referred to in s 146 of the Evidence Act, was explained in *R v Sweet-Escott* (1971) 55 Cr App Rep 316, as follows:

> Credit involves antecedents, associates, character, impartiality and consistency while credibility concerns the opportunities for a power of observation of the witness, his accuracy for recollection, and capacity to explina what he remembers.

[41] I also found instructive the words of Gillen J in *Sean Thornton (a minor by his mother and next friend) v Northern Ireland Housing Executive* [2010] NIQB 4 which was adopted in *McAllister v Campbell* [2014] NIQB 24:

A Credibility of a witness embraces not only the concept of his truthfulness i.e. whether the evidence of the witness is to be believed but also the objective reliability of the witness i.e. his ability to observe or remember facts and events about which the witness is giving evidence.

B In assessing credibility the court must pay attention to a number of factors which, inter alia, include the following:

– The inherent probability or improbability of representations of fact

– The presence of independent evidence tending to corroborate or undermine any given statement of fact

C – The presence of contemporaneous records

– The demeanour of witnesses e.g. does he equivocate in cross examination

– The frailty of the population at large in accurately recollecting and describing events in the distant past.

D – Does the witness take refuge in wild speculation or uncorroborated allegations of fabrication

– Does the witness have a motive for misleading the court

E – Weigh up one witness against another

[42] On the assessment and evaluation of PW2, I found her to be forthright, and I appreciated the fact that she did not attempt to embellish or varnish her testimony. She was earnest in her explanation, and did not strike me as F someone whose evidence I had to view with circumspection. Her evidence remained intact even after cross-examination. Discrepancies in her evidence, if at all, were explained, and on the whole, she was a convincing witness. In fact, as the mother of the baby who had died, PW2's testimony was the best evidence, as it was direct and based on her personal knowledge, pursuant to s 60 G of the Evidence Act 1950, which reads:

Section 60 — Oral evidence must be direct

(1) Oral evidence shall in all cases whatever be direct, that is to say-

H (a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

I (c) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

(d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

[43] Furthermore, she was corroborated by PW3 who was present throughout the incident. I found no basis to disbelieve both PW2 and PW3, as they would have had no reason whatsoever to fabricate or concoct evidence.

[44] The evidence of both PW2 and PW3 was indicative that the postings contained false statements. Furthermore, it was undisputed that after inves tigations had been conducted, the police had cleared the plaintiff of all wrongdoing pertaining to the death of the baby.

[45] The plaintiff herself, in my view, was also direct and truthful. Her evidence was corroborated by both PW2 and PW3, and I had no basis to disbelieve her.

[46] The defendant, on the other hand, whilst testifying, equivocated on several occasions, and was evasive. I found her to be extremely combative, and adamant that she was right, in spite of incontrovertible evidence that refuted her claims. To borrow the words of Gillen J in *Sean Thornton (a minor by his mother and next friend) v Northern Ireland Housing Executive* [2010] NIQB 4, the defendant in the present case took refuge in 'wild speculation and uncorroborated allegations of fabrication'.

[47] Her personal beliefs and opinion on medically unsupervised home-births clouded her judgment and provided her with a jaundiced view of *doulas* in general, and the plaintiff in particular. At the expense of proving her point in court, she had contradicted herself on several occasions. I took a dim view of both her demeanour as well as her testimony in court, which was laced with patronising and caustic undertones, as she even suggested that PW2 was not telling the truth. As such, both her credit and credibility were severely compromised.

Whether the defence of fair comment was proved

[48] The defendant's reliance on the defence of fair comment was premised on s 9 of the Defamation Act, which reads:

> Section 9 — Fair comment
>
> In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

[49] It is trite law, and has been held in a plethora of cases, including *Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors* [2012] 4 MLJ 191; [2012] 1 LNS

A 1359, that to establish the defence of fair comment, the defendant must show the following:

(a) that it was a comment and not a statement of fact;

(b) that the comment was on a matter of public interest; and

B

(c) that the facts relied on to support the comment were relevant and true.

[50] The defence of 'fair comment' was also explained in *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* C [2014] 3 CLJ 560; [2014] 4 MLJ 242, where the Court of Appeal, through Abang Iskandar JCA (as he then was) held:

> *The comment must be based on true facts which are either contained in the publication or are sufficiently referred to.* It is for the defendant to prove that the underlying facts are true. If he or she is unable to do so, then the defence will fail. As with justification, the defendant does not to have to prove the truth of *every* fact provided the comment was fair in relation to those facts which are proved. *However, fair in this context, does not mean reasonable, but rather, it signifies the absence of malice. The views expressed can be exaggerated, obstinate or prejudiced, provided they are honestly held. If the claimant can show that the publication was made maliciously, the defence of fair comment will not succeed.* (Emphasis added.)

D

E

[51] What is crucial to note is that the word 'fair' in fair comment signifies an absence of malice, as held in several cases including *Dato' Sri Mohd Najib bin Tun Hj Abdul Razak & Anor v Mohd Rafizi Ramli and another appeal* [2018] 1 MLJ 295 and *Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Nurul Izzah bt Anwar & Anor* [2018] 3 MLJ 726.

F

[52] On the issue of malice, I drew guidance from the case of *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173, where it was stated by Wan Hamzah SCJ:

G

> We are of the view that *malice, not unlike intention, is a state of mind*. Invariably, unless there is an express admission by the defendant that he has been malicious in his conduct , then *the presence of malice can only be deduced or inferred from the circumstances obtaining in each case*. (Emphasis added.)

H

[53] Thus, malice may be inferred from the defendant's conduct 'from availing himself of means of information which lay at hand when the slightest inquiry would have shown the true situation, or where he deliberately stopped short in his inquiries in order not to ascertain the truth': per Wan Hamzah J (as I he then was), in *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173 .

[54] A fundamental issue in this case, therefore, was whether the defendant had in fact abstained from inquiring into facts, something which, if done, would have provided an accurate account of the baby's death. In my view, the

defendant had abstained from that crucial exercise and as such, had failed to establish an absence of malice, for the following reasons. A

[55] The first telling fact is that the defendant admitted that the contents of the postings, when made, were derived from information provided by third parties whom she claimed were friends, but details of whom she failed to provide, and information of which she had failed to verify. B

[56] The defendant also submitted that the postings were made based on information she derived from the patient progress note dated 4 February 2020, and home-birth case report dated 6 February 2020, prepared by one Dr Shahrul Azwan Azhari ('Dr Shahrul') and a nurse, one Hafidza Hashim respectively. C

[57] In my view, this argument is untenable, bearing in mind that first and foremost, PW2 testified that she was unsure about Dr Shahrul, and that she had neither been shown, nor had verified any information documented in the patient progress note. D

[58] Secondly, the patient progress note had contradicted the home-birth case report, as the information contained in the latter had actually supported the version of events provided by PW2. E

[59] Thirdly, the authors of both the patient progress note and the home-birth case report were not present in court to verify the contents such documents . This triggered the issue of whether an adverse inference pursuant to s 114(g) of the Evidence Act, should be drawn against the defendant for failing to produce Dr Shahrul and Hafidza Hashim. F

Whether adverse inference should be drawn against the defendant for failing to produce Dr Shahrul and Hafidza Hashim G

[60] Reference is made to illustration (g) of s 114 of the Evidence Act, which reads: H

> Section 114 — Court may presume existence of certain fact
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case. I
>
> ILLUSTRATIONS
>
> The court may presume:

A (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

[61] As stated by the Supreme Court in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, the evidence that is referred to in s 114(g) of the B Evidence Act must not only be relevant, it must be material.

[62] In my view, these witnesses were material to the facts of the present case as they would have been able to lend credence to the defendant's narrative that C she had relied on the contents of these documents, which she averred was the truth. Their testimony would have been the best evidence. On this note, reference is made to the case of *Sabah Shell Petroleum Co Ltd & Anor v The Owners of and/or Any Other Persons Interested in the Ship or Vessel the 'Borcos Takdir'* [2012] 5 MLJ 515, where it was stated by Nallini Pathmanathan J (now D FCJ):

> ... *The person best placed to explain fully the events of the day would have been the Master but the defendant failed to call the master as witness*. Stating that he was uncooperative. Given the importance of this witness' evidence, the defendant's failure to subpoena him led this court to conclude that the master's evidence if E produced, would affect the defendant adversely. This was a fit and proper case for this court to draw an adverse inference under s 114(g) against the defendant ... (Emphasis added.)

[63] A further aspect of the evidence referred to in illustration (g) of s 114 of F the Evidence Act is that an adverse inference is drawn only if there was deliberate withholding of the evidence. Deliberate withholding of the evidence is inferred from the lack of a reasonable explanation for the failure to produce the witness: *Adel Muhammed El Dabbah v AG for Palestine* [1944] AC 156, *Murugan v Lew Chu Cheong* [1980] 2 MLJ 139, and *Marappan a/l Muthusamy* G *v R Sivam a/l Ramasamy* [2014] 4 MLJ 428. In the present case, there was no explanation proferred for the absence of both Dr Shahrul and Hafidza Hashim, leading to the inference that there was deliberate withholding of the witness es.

[64] Although an adverse inference is generally not drawn against the H defendant , on the basis the defendant has no legal burden to prove a case, in this ca se it was the defendant who had raised the issue of Dr Shahrul. As such, this rendered the application of s 103 of the Evidence Act, which imposed the legal burden on the person who wishes the court to believe in the existence of a particular fact . Accordingly, the failure to produce a witnesses or evidence to I establish such fact, would result in an adverse inference. At this juncture, I drew guidance from the Court of Appeal case of *Chan Yoke Lain (administrator of the estate of Chong Yoke Fah, deceased) v Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 MLJ 303), where s 114(g) of the Evidence Act was invoked against the defendant company in that case for failing to produce its agent as a

witness, to explain the irregularities concerning the signature of the insured deceased. *Chan Yoke Lain (administrator of the estate of Chong Yoke Fah, deceased) v Pacific & Orient Insurance Co Sdn Bhd* was followed subsequently in several cases including *Viking Life-Saving Equipment Pte Ltd lwn Port Marine Safety Services Sdn Bhd* [2013] 9 MLJ 111.

[65] As such, the failure to call Dr Shahrul and Hafidza Hashim resulted in the invocation of an adverse inference against the defendant.

Whether contents of the postings were based on hearsay

[66] The patient progress note , therefore, was unreliable, as it was hearsay and as its maker was not called as a witness. It was also not verified by PW2 and in fact contradicted PW2's evidence, whom I had already found to be reliable and credible.

[67] The defendant claimed that her reliance was also based on the interview she had personally conducted with PW2 on 8 February 2018, where she claimed that PW2 had informed her that she had attended the plaintiff's antenatal classes, and that she had given her version of events to a nurse by the name of Yurita Kamil.

[68] Firstly, the existence (or absence of) Yurita Kamil remained a mystery as she was not produced to verify the defendant's narrative. Secondly, PW2 testified that this health record documented by the defendant was not shown to her to verify, and that it contained untruths and inaccuracies. It was my finding, therefore, that the information in the health record was based on the defendant's own conclusion and assumptions , which were not true.

[69] The defendant, therefore, not only relied on hearsay statements (as she had admitted in court), she deliberately chose not to verify the truth of the postings.

[70] It is also pertinent to note that there was no effort whatsoever to contact the plaintiff herself to verify the actual account of that fateful night of 4 February 2018.

[71] In the final analysis, it was my finding that the defendant had deliberately abstained from inquiring into the facts, and in my view, based on her demeanour and testimony in court, she was not interested in the truth of what had actually transpired on the night of 4 February 2018. Pursuant to the accounts given by the plaintiff's witnesses, it was my opinion that the actual version had been scrambled by the defendant to the extent that it was furthest from the truth. Malice was, therefore, not negated and as such, the defence of

fair comment had failed, as the comments which were based on falsity, were enveloped in bad faith, and not made in the interest of the public.

DAMAGES

Whether the plaintiff was entitled to general damages

[72] It is trite law that damages caused to the plaintiff is presumed in law and there is, therefore, no requirement to prove the same, since such damages are both vindication and consolation for the wrong done, which had resulted in hurt, anxiety, loss of self-esteem, the sense of indignity and the outrage felt by the plaintiff (see *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492; [2010] 5 CLJ 301).

[73] I drew guidance from the cases of *Yeo Ing King v Melawangi Sdn Bhd* [2016] 5 MLJ 631, and *Datuk May Phng @ Cho Mai Sum (suing as chairman, committee member and representative of Persatuan Penganut Buddha Rumah Kechara Malaysia ('Kechara House'), an association registered under the Societies Act 1966 and in the capacity of representative of Kechara House and/or all Kechara House's members) & Ors v Tan Pei Pei* [2018] 11 MLJ 741, where in the latter case, it was stated by Kamaludin Md Said J (now JCA):

> Libel is actionable per se, that is to say, there is *no need to prove actual damage* for 'the law presumes that some damage will flow in the ordinary course of things from the mere invasion of his absolute right to reputation': *Gatley on Libel and Slander* (10th Ed) at p 983. (Emphasis added.)

[74] The factors that should be considered in determining damages for defamation, though not exhaustive, were enumerated by Gopal Sri Ram JCA (as he then was) in *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494, as follows:

> In *Defamation Law, Procedure & Practice by Price & Duodu* (3rd Ed, para 20–4 at p 208) the learned authors set out the several factors th at a court must take into account in assessing compensatory damages. This is what they say:
>
> > The amount of damages awarded in respect of vindication and injury to reputation and feelings depends on a number of factors:
> >
> > (1) The gravity of the allegation.
> >
> > (2) The size and influence of the circulation.
> >
> > (3) The effect of the publication.
> >
> > (4) The extent and nature of the claimant's reputation.
> >
> > (5) The behaviour of the defendant.
> >
> > (6) The behaviour of the claimant.

[75] The defendant argued that general damages, if at all, should be minimal, on the basis that the plaintiff was neither well-known, nor prominent in the community. I am unable to agree with this contention, bearing in mind that it was undisputed that the plaintiff had her services as a *doula* advertised online and had many students throughout the country.

[76] Furthermore, the fact that the defamatory comments were made online on a Facebook account was a consideration, bearing in mind the rapid forwarding and sharing that online comments are susceptible to, and the length of time that the postings were displayed, which in this case was six months.

[77] The defendant, however, submitted that the postings were deleted after six months and, therefore, the news could not have spread at the extent as contended by the plaintiff. I am unable to agree with this submission as it has been presumed in several cases including *Datuk Seri Anwar bin Ibrahim v Wan Muhammad Azri bin Wan Deris* [2014] 9 MLJ 605; [2014] 1 LNS 662 that publication over the Internet has wide circulation. In fact, by virtue of s 114 of the Evidence Act, the court may presume such a fact. The provision reads:

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

[78] The scope and extent of s 114 is wide enough for the court to presume facts not limited to its illustrations. This was explained by Kang Hwee Gee J (as he then was) in *Public Prosecutor v Krishna Rao a/l Gurumurthi & Ors* [2000] 1 MLJ 274, where he had stated that the 'instances which the court may draw such presumptions are inexhaustive'. The onus is, therefore, on the defendant to rebut such presumption.

[79] At this juncture, it is also vital to note that the court has the discretion to take judicial notice of undisputed fact as provided in s 57 of the Evidence Act, which reads;

> Section 57 — Facts of which court must take judicial notice
>
> (1) The court shall take judicial notice of the following facts:
>
> (a) all laws or regulations having the force of law now or heretofore in force or hereafter to be in force in Malaysia or any part thereof;
>
> (b) all public Acts passed or hereafter to be passed by the Parliament of the United Kingdom, and all local and personal Acts directed by it to be judicially noticed;
>
> (c) articles of war for the armed forces or any visiting force lawfully present in Malaysia;

(d) the course of proceedings in Parliament, in the federal legislatures that existed in Malaysia before Parliament was constituted, in the legislature of any State in Malaysia and in the Parliament of the United Kingdom;

(e) the accession of the Yang di-Pertuan Agong and the accession of the Ruler of any state in Malaysia and the appointment of a Yang di-Pertua Negeri;

(f) the accession and the sign manual of the sovereign for the time being of the United Kingdom;

(g) the seals of all the courts of Malaysia, all seals which any person is authorised to use by any law in force for the time being in Malaysia or any part thereof, all seals of which English courts take judicial notice, and the seals of Courts of Admiralty and maritime jurisdiction and of notaries public;

(h) the accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any part of Malaysia, if the fact of their appointment to such office is notified in the Gazette or in any State Gazette;

(i) the existence, title and national flag of every state or sovereign recognised by the *Yang di-Pertuan Agong*;

(j) the ordinary course of nature, natural and artificial divisions of time, the geographical divisions of the world, the meaning of Malay and English words, and public festivals, fasts and holidays notified in the Gazette or in any State Gazette;

(k) the Commonwealth countries;

(l) the commencement, continuance and termination of hostilities between Malaysia or any part of the Commonwealth and any other country or body of persons;

(m) the names of the members and officers of the court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates and other persons authorised by law to appear or act before it;

(n) the rules of the road on the land, sea regulations and the rules of the air;

(o) all other matters which it is directed by any written law to notice.

In all these cases, and also on all matters of public history, literature, science or art, the court may resort for its aid to appropriate books or documents of reference.

If the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until the person produces any such book or document as it considers necessary to enable it to do so.

[80] Although s 57 of the Evidence Act sets out matters which the court must take judicial notice of, the list therein is not exhaustive. The court may take judicial notice of matters which are of common and general knowledge. See *Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153.

[81] The manner in which the court takes judicial notice of facts was expounded by Syed Agil Barakbah SCJ in *Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30:

> The important point to note is that section 57 does not prohibit the courts from taking judicial notice of other facts not mentioned therein. The matter which the court will take judicial notice must be the subject of common and general knowledge and its existence or operation is accepted by the public without qualification or contention. The test is that the facts involved must be so sufficiently notorious that it becomes proper to assume its existence without proof ...
>
> *Judicial knowledge is continually extended to keep pace with the advance of art, science and general knowledge. Subsections (2) and (3) of section 57 provide discretionary power to the court to resort to the aid of approiate books or documents of reference in all meters of public history, literature, science or art.* (Emphasis added.)

[82] As such, I took judicial notice of the breakneck speed that online news is susceptible to spreading, as this was a sufficiently notorious fact that the court could not ignore; compounded by the fact that such news was false. After all, it has been said that 'falsehood flies, and truth comes limping after it, so that when men come to be undeceived, it is too late; the jest is over, and the tale hath had its effect'.

[83] The falsity of the postings was exarcebated by its contents of which were grave in nature. The plaintiff had been accused of not only lying but of committing the most heinous crime. The defendant had left an indelible stain on the reputation of the plaintiff, and whatever monetary compensation awarded to the plaintiff would never be able to restore her reputation fully. I, therefore, saw it befitting that the plaintiff should be awarded a sum of MYR100,000 for general damages.

Whether the plaintiff was entitled to exemplary/punitive damages

[84] The concept of exemplary damages was explained by the Court of Appeal in *Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors* [2019] 1 MLJ 421; [2019] 2 CLJ 261, and *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784; [2017] 1 LNS 500, where in the latter case, it was stated by Mohd Zawawi Salleh JCA (now FCJ):

> [33] *The exemplary damages or punitive damages — the two terms now regarded as*

A *interchangeable* — are additional damages awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, *or where he has acted with a 'contumelious disregard' for the right to the plaintiff*. The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may also have an importa nt function in vindicating the rights of the plaintiff. (See *Rookes v Barnard* [1964] 1 All ER 347; *AB v Southwest Water Services* [1993] All ER 609 *Broome v Cassell & Co* [1971] 2 QB 354, *Laksamana Realty Sdn Bhd v Goh Eng Hwa and Another Appeal* [2005] 4 CLJ 871; [2006] 1 MLJ 675). (Emphasis added.)

[85] In the case of *Rookes v Barnard* [1964] 1 All ER 367, referred to in *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal*, two categories were recognised for a claim for exemplary/punitive damages:

> ... The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category — I say this with particular reference to the facts of this case — to oppressive action by private corporations or individuals. *Cases in second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff ...* (Emphasis added.)

[86] Exemplary damages is, therefore, not compensatory in nature but is a type of damages relied on by the courts to punish the wrongdoer for contumelious and reprehensible conduct, in disregard of the plaintiff's rights. It also acts as a deterrent to others who are contemplating conduct of a similar nature.

[87] I found the conduct of the defendant most indecorous. She not only published the postings, she also responded to the comments made as a result of the postings, with responses that were accusatory, and downright vicious. The defendant, not only maligned and villified the plaintiff, she had in actual fact launched a smear campaign against the plaintiff which made the latter a victim of cyber-bullying.

[88] Her conduct was rendered egregious by the police report that she had lodged against the plaintiff on 10 February 2018. The defendant contended that her comments were made in the interest of the public, in particular expectant mothers. In my view, if she genuinely had in mind the interest of expectant mothers, it is baffling why she had never lodged a police report against PW2, or any other family member of PW2, bearing in mind that it was PW2 herself who made the choice not to go to the hospital when she had initially experienced contractions. The parents of the baby, were adults of sound mind, and knew very well the implications of their choice. Yet, the

defendant chose to single out the plaintiff, without so much of a whisper castigating PW2 in the postings or in the police report. In fact, the defendant showed sympathy towards PW2 in the following statement which formed part of the postings:

> ... Ibunya walaupun mulutnya kata redha, saya pasti malamnya pasti dikejar mimpi. Hatinya pasti diulit sepi.

[89] The defendant had also refused to delete the postings although the plaintiff had been cleared by the police of all wrong doing as early as February 2018. She had left the postings there for six months, knowing very well the implications of doing so. Even in court, not a modicum of remorse or compunction was displayed by the defendant. In fact, she continued to insist, with pomposity, that the contents of the postings were true.

[90] The defendant argued that she was not responsible for the comments posted by the public, as those were beyond her control. However, it has to be reminded that by virtue of s 114A of the Evidence Act, the defendant is presumed to have published the responses to her comments by providing a platform for such purpose. The provision reads:

> Section 114A — Presumption of fact in publication
>
> (1) A person whose name, photograph or pseudonym appears on any publication depicting himself as *the owner, host, administrator*, editor or sub-editor, *or who in any manner facilitates to publish* or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved. (Emphasis added.)

[91] It is also ironic that whilst the defendant proclaimed to have the interest of expectant mothers at heart, she, who knew that the plaintiff herself was pregnant at the material time, continued to verbally assail her and had even cast aspersions on her pregnancy and her husband, in the following statement which formed part of the postings :

> Pelik la, u are heavily pregnant now. Tak takut ke Allah bayar cash to u. hasil perbuatan dan pembohongan u tu? Yakin sangat ke yg ur husband tu boleh conduct d delivery kali ni tanpa sebarang masalah walaupun dia dah berjaya sblm ni?

[92] I found this very unbecoming, since the defendant, a medical doctor, should have acted in a more professional manner. Her comments went beyond information-sharing, and spiralled out of control, creating communal tension. The defendant had targeted the plaintiff in her crusade, and made her the sacrificial lamb, causing the public to verbally crucify her.

[93] This court cannot turn a blind eye to the activities of quidnuncs, since the moment false news is released into the wilderness of the world wide web, that bell cannot be un-rung. In light of such indecorous conduct of the defendant, which can never be condoned by the court, I was of the view that an award of MYR100,000 for exemplary/punitive damages was reasonable, fair and just.

[94] In addition to general and exemplary damages, the defendant was ordered, pursuant to O 45 r 5 of the Rules of Court 2012, to post an apology on the Facebook timelines of both the plaintiff and defendant, within seven days of the decision of this court, and for such apology to remain at such timelines for six months. I am unable to agree with the defendant that an apology is not an appropriate remedy in this case.

[95] The defendant was also ordered to refrain from publicly commenting on any matter relating to the death of the baby on 4 February 2018. In my view, this order was appropriate as it was not prejudicial to the defendant, and more importantly, it would provide closure to the matter.

CONCLUSION

[96] In the upshot and final analysis, therefore, based on the aforesaid reasons, and after careful scrutiny and judicious consideration of all the evidence before this court, and written and oral submissions of both parties, the plaintiff's claim was allowed with costs in the amount of MYR30,000 (subject to allocatur fees).

Plaintiff's claim allowed with costs of RM30,000 subject to allocatur fees.

Reported by Dzulqarnain bin Ab Fatar